

**SANITIZED DEC. 04-047 U – BY GEORGE V. PIPER – SUBMITTED FOR
DECISION ON BRIEFS ON 06/21/04 - ISSUED 07/19/04**

SYNOPSIS

**PURCHASERS' USE TAX -- PURCHASE OF FABRICATION SERVICES
BY CONTRACTOR SUBJECT TO USE TAX** – Pursuant to W. Va. Code § 11-15-8a(a), purchases by a contractor of tangible personal property or taxable services for use or consumption in providing a contracting service are subject to sales or use tax.

FINAL DECISION

A tax examiner with the Field Auditing Division of the West Virginia State Tax Commissioner's Office conducted an audit of the books and records of the Petitioner. Thereafter, on November 13, 2003, the Director of this Division of the Commissioner's Office issued a purchasers' use tax assessment against the Petitioner. This assessment was issued pursuant to the authorization of the State Tax Commissioner, under the provisions of Chapter 11, Articles 10 and 15A of the West Virginia Code. The assessment was for the period of October 1, 1998 through September 30, 2003, for tax, interest, through October 31, 2003, and no additions to tax, for a total assessed liability. Written notice of this assessment was served on the Petitioner.

Prior to filing its petition for reassessment, Petitioner remitted an amount which represented the purchasers' use tax and interest thereon pertaining to the raw materials purchased by the Petitioner from its supplier, which have been conceded as taxable by Petitioner in this proceeding.

Thereafter, by mail postmarked January 5, 2004, the Petitioner timely filed with this tribunal, the West Virginia Office of Tax Appeals, a petition for reassessment with respect to the balance of the assessment. *See* W. Va. Code § 11-10A-8(1) [2002].

Subsequently, notice of a hearing on the petition was sent to the Petitioner; however, the parties agreed prior to hearing that the matter in controversy should be decided upon stipulations and the filing of briefs, in lieu of a hearing in person.

FINDINGS OF FACT

1. In the year 2001, Petitioner was a subcontractor with respect to the construction of a recreation center on a university campus in West Virginia. Specifically, Petitioner contracted to install certain portions of the roof and entered into a contract with a manufacturing company to provide the raw materials and fabrication services for that roof.

2. The total of the raw materials and fabrication services purchased from the manufacturing company was one amount, of which a portion of that amount related to the fabrication services rendered by the contractor.

DISCUSSION

The sole issue is whether the Petitioner has shown that the purchasers' use tax only applies to the Petitioner's purchase of raw materials, and not to the purchase of

fabrication services, because said services in and of themselves allegedly fall within the exemption for contracting.

W. Va. Code § 11-15-8a(a) expressly states that in relevant part, “The provisions of this article shall not apply to contracting services. However, purchases by a contractor of tangible personal property or taxable services for use or consumption in the providing of a contracting service shall be taxable[.]”

In W. Va. Code § 11-15-8a(d)(1), entitled “Definitions,” the term “contract” or “contracts” references the words, “services sold to or to be rendered in performance of the contract,” although that section limits contracts” to those which are not open-ended.

Therefore, it is clear that the W. Va. Code § 11-15-8a(a) provides that both materials and services, whether they be of a fabrication variety or otherwise, are subject to the purchasers’ use tax.

Petitioner’s counsel argues that the term “services” is not included in W. Va. Code § 11-15-9(a)(a), which provides that sales of building materials or building supplies or other property sold to a person engaging in the activity of contracting remain taxable.

What Petitioner’s counsel overlooks is that W. Va. Code § 11-15-9(a)(9) pertains only to sales of tangible personal property to a person for the purpose of resale in that same form. Services for resale are addressed by W. Va. Code § 11-15-2(b)(17). Fabrication services themselves are manufacturing, not contracting.

The issues presented in this matter involve the following important rules of administrative agency authority and statutory construction. Initially, it is important at all times to recognize and to give more than just “lip service” to two general points: (1) rather than utilizing a purely “*de novo*” scope of review, due deference is to be given by

all reviewing tribunals to the expertise of the administrative agency, in this case, the State Tax Commissioner, even with respect to an “issue of law,” when that issue of law is one within the expertise of the administrative agency, *see Appalachian Power Co. v. State Tax Department*, 195 W. Va. 573, 582, 466 S.E.2d 424, 433 (1995); and (2) any applicable legislative regulation does not merely reflect the administrative agency’s position but, instead, has been legislatively reviewed and approved, has exactly the same force and effect as a statute, and is, therefore, subject to the usual, deferential rules of statutory construction, *see Feathers v. West Virginia Board of Medicine*, 211 W. Va. 96, 102, 562 S.E.2d 488, 494 (2002).

The following specific points flow from these general points. “[I]f the statute is silent or ambiguous with respect to the specific issue, the question for the [reviewing] court [including this tribunal] is whether the agency’s answer is based on a permissible construction of the statute.” Syllabus point 4, in part, *Appalachian Power Co. v. State Tax Department*, 195 W. Va. 573, 466 S.E.2d 424 (1995) (emphasis added). Similarly, “the Tax Commissioner need not write a rule that serves the statute in the best or most logical manner; he [or she] need only write a rule that flows rationally from the statute.” *Id.*, 195 W. Va. at 588, 466 S.E.2d at 439 (emphasis added). Thus, “[i]nterpretations of statutes by bodies charged with their administration are given great weight unless clearly erroneous.” Syllabus point 3, *Shawnee Bank, Inc. v. Paige*, 200 W. Va. 20, 488 S.E.2d 20 (1997) (internal citation omitted) (emphasis added). Finally, “courts will not override administrative agency decisions, of whatever kind, unless the decisions contradict some explicit constitutional provision or right, are the results of a flawed process, or are either fundamentally unfair or arbitrary.” *Appalachian Power*, 195 W. Va. at 589, 466 S.E.2d

at 440 (*quoting Frymier-Halloran v. Paige*, 193 W. Va. 687, 694, 458 S.E.2d 780, 787 (1995)).

CONCLUSIONS OF LAW

Based upon all of the above it is **HELD** that:

1. In a hearing before the West Virginia Office of Tax Appeals on a petition for reassessment, the burden of proof is upon a petitioner-taxpayer, to show that the assessment is incorrect and contrary to law, in whole or in part. *See* W. Va. Code § 11-10A-10(e) [2002] and 121 C.S.R. 1, § 63.1 (Apr. 20, 2003).

2. The Petitioner-taxpayer in this matter has failed to carry the burden of proof with respect to its argument that the purchase of fabrication services (unlike materials) from a supplier which are then used or consumed by a contractor in the activity of contracting are not subject to use tax. *See* 121 C.S.R. 1, § 69.2 (Apr. 20, 2003).

DISPOSITION

WHEREFORE, it is the **FINAL DECISION** of the **WEST VIRGINIA OFFICE OF TAX APPEALS** that the purchasers' use tax assessment issued against the Petitioner for the period of October 1, 1998 through September 30, 2003, for tax, interest, and no additions to tax, should be and is hereby **AFFIRMED**.

Because the Petitioner has previously remitted a certain amount of the assessment, **only the balance remains due** to the State Tax Commissioner of West Virginia.

Pursuant to the provisions of W. Va. Code § 11-10-17(a) [2002], **interest accrues** on the unpaid tax portion of the assessment until this liability is fully paid.